



December 22, 2000

Mr. Thomas E. Shute  
Assistant City Attorney  
City of San Antonio  
P.O. Box 839966  
San Antonio, Texas 78283-3966

OR2000-4834

Dear Mr. Shute:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 142570.

The City of San Antonio (the "city") received a written request for "Bid No. 00-181, as furnished, by Air Cor Corporation complete with all attachments." You do not contend on the city's behalf that the requested information is excepted from public disclosure. Rather, you have requested a decision from this office pursuant to section 552.305 of the Government Code, which authorizes a governmental body to rely on the arguments of third parties with a privacy or property interest in the information to make arguments for non-disclosure. In accordance with the requirements of section 552.305(d), you have notified the affected third party, AirCor Corporation ("AirCor"), whose information has been requested.

You state that the city requested a decision from this office because "AirCor has indicated on its 'Partial List of Customers and References' that it desires the contents thereof to be treated as confidential." You have submitted to this office for review the following documents from AirCor's proposal: a "Power of Attorney" with accompanying "Acknowledgements," a "Bid Bond," AirCor's "Limited Warranty," and the "Partial List Customers and References." Because you have not submitted any other portion of AirCor's proposal, this office has no basis on which to conclude that any portion of the proposal not before us is excepted from public disclosure. Consequently, this ruling is limited to the few proposal documents you submitted to this office. We assume that the city has released all

other portions of the proposal to the requestor. If it has not, it must do so at this time. *See* Gov't Code § 552.302.

AirCor submitted to this office a response to your section 552.305 notice, arguing that its proposal is excepted from public disclosure under section 552.110 of the Government Code and section 252.049 of the Local Government Code. Section 552.110 of the Government Code protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision, and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.<sup>1</sup> *Id.* This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). In this instance, however, AirCor has not made a *prima facie* showing that any of the information before us, including the list of customers and references, constitutes trade secret information.

The commercial or financial branch of section 552.110 requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. *See* Open Records Decision No. 661 (1999). Again, AirCor has made no such showing with regard to the information you submitted to this office.

As noted above, AirCor also contends that the contents of its proposal are made confidential under section 252.049 of the Local Government Code, which provides as follows:

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<sup>1</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

- (a) Trade secrets and confidential information in competitive sealed bids are not open for public inspection.
- (b) If provided in a request for proposals, proposals shall be opened in a manner that avoids disclosure of the contents to competing offerors and keeps the proposals secret during negotiations. All proposals are open for public inspection after the contract is awarded, but trade secrets and confidential information in the proposals are not open for public inspection.

However, this provision is merely duplicative of the protection offered to proprietary information under section 552.110 of the Government Code. Because AirCor has not demonstrated that the information at issue constitutes trade secrets or is otherwise made confidential by law, section 252.049 is also inapplicable here. We therefore conclude that the city must release the information at issue in its entirety.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

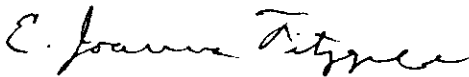
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



E. Joanna Fitzgerald  
Assistant Attorney General  
Open Records Division

EJF/RWP/seg

Ref: ID# 142570

Encl. Submitted documents

cc: Ms. Bertha Tunis-Holton  
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(w/o enclosures)

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AirCor Corporation  
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(w/o enclosures)